QUESTION ON NOTICE

Senator Patrick

Question

Can the Department provide any documentation that might describe the policy rationale prior to entering into the declarations [on dispute settlement made on 22 March 2002 under the Statute of the International Court of Justice and the United Nations Convention on the Law of the Sea]?

Answer

The Department attaches the following documents in response to the Senator's question:

- *A joint press release by the then Minister for Foreign Affairs and Attorney-General dated 25 March 2002;*
- *the National Interest Assessment for the declarations tabled on 18 June 2002; and*
- *the testimony of officials to a sitting of the Joint Standing Committee on Treaties on 12 July 2002.*

The Hon. Alexander Downer, MP
FORMER MINISTER FOR FOREIGN AFFAIRS

ARCHIVED MATERIAL

Joint Media Release

Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams

25 March 2002

Changes to International Dispute Resolution

The Attorney-General Daryl Williams and the Minister for Foreign Affairs Alexander Downer today announced changes to the terms upon which Australia accepts international dispute resolution mechanisms, particularly as they apply to maritime boundaries.

These changes relate particularly to the International Court of Justice (ICJ) and to dispute settlement under the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

Australia has lodged a declaration accepting the ICJ and the International Tribunal for the Law of the Sea as venues for compulsory dispute settlement under the Law of the Sea Convention. Australia was an original party to the Convention and ratified it in 1994.

Australia remains one of only 61 countries out of the United Nations' 189 members that accept the compulsory jurisdiction of the ICJ. Of those, the majority have made various types of reservations to their acceptance of the Court's jurisdiction.

Under the Convention, Australia may choose the dispute resolution bodies it prefers and whether to exclude certain areas, such as maritime delimitation, from compulsory dispute resolution.

Australia has made a declaration excluding the setting of maritime boundaries from compulsory dispute resolution. Australia's strong view is that any maritime boundary dispute is best settled by negotiation rather than litigation.

Australia's maritime zones abut the maritime zones of Indonesia, New Zealand, Papua New Guinea, the Solomon Islands, France (New Caledonia, Kerguelen Island and Antarctica), East Timor and Norway. Australia is yet to resolve boundaries with France, New Zealand and Norway in the maritime area adjacent to Antarctica. Australia has negotiated treaties on permanent maritime boundaries with Indonesia, Papua New Guinea, the Solomon Islands and France (New Caledonia and Kerguelen Island). Negotiations are ongoing with New Zealand.

Australia has also amended its acceptance of the jurisdiction of the ICJ under the so-called 'optional clause' of the ICJ Statute. Under the changes announced today, Australia will continue to accept the jurisdiction of the Court, subject to the following exceptions:

- where the parties have agreed to other peaceful means of dispute resolution;

- where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute; and
- where a country has only accepted the compulsory jurisdiction of the court for a particular purpose or has accepted the compulsory jurisdiction of the court for a period of less than one year. This underpins Australia's view that actions relying on the compulsory jurisdiction of the ICJ should be undertaken on the basis of a long-term commitment to acceptance of that jurisdiction.

Australia is, and remains committed to the negotiated settlement of disputes. The ICJ and the dispute resolution mechanisms under the Convention on the Law of the Sea play an important role in the settlement of disputes.

The Government's view is that every endeavour should be made to reach an agreed resolution of disputes.

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Local Date: Tuesday, 07-Jan-2014 10:30:24 EST

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AUSTRALIAN DECLARATION UNDER PARAGRAPH 2 OF

ARTICLE 36 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 1945, LODGED AT NEW YORK ON 22 MARCH 2002.

Documents tabled on 18 June 2002:

- National Interest Analysis

- Text of the proposed treaty action

Australian declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945, lodged at New York on 22 March 2002.

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. Australia's declaration under Article 36(2) of the Statute of the International Court of Justice was withdrawn and replaced with a declaration containing different terms.

2. This action terminates the application of Australia's previous declaration under Article 36(2). The new declaration applies from the date it was lodged.

Date of proposed binding treaty action

4. The notice advising the withdrawal of the previous declaration and replacing it with a new declaration was signed on 21 March 2002.

5. The declaration was lodged and entered into force on 22 March 2002.

6. The Minister for Foreign Affairs wrote to the Chair of the Joint Standing Committee on Treaties on 25 March 2002, advising that the treaty action took place on 22 March 2002 with immediate effect. The reason for taking the treaty action prior to tabling and consideration by the Committee relates to its sensitivity. If it became known that the Government intended to take this action before the new declaration was lodged, then another country may have been able to pre-empt the Government's decision and commence proceedings against Australia prior to Australia's lodgement of the declaration.

Date of tabling of the proposed treaty action

7. 18 June 2002.

Summary of the purpose of the proposed treaty action and why it is in the national interest

8. The purpose of the treaty action is to place some limitations on Australia's acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). The changes are in line with the Government's view that that countries like Australia that have a broad and long term acceptance of the jurisdiction of the International Court of Justice are not exposed to the possibility of litigation by countries that only accept the compulsory jurisdiction of the Court for a

short time or for a specific purpose. It is also the Government's view that maritime boundary disputes are best resolved through negotiation and not litigation.

Reasons for Australia to take the proposed treaty action

9. Only States can bring contentious matters before the ICJ for adjudication. The jurisdiction before the ICJ is based on consent. There are three basic forms of consent. First, the countries may enter into a `compromis' (agreement) to refer a specific dispute to the Court. Secondly, a treaty to which both of the countries involved are parties may contain a provision referring disputes to the court. Thirdly, a State may lodge a declaration under Article 36(2) of the ICJ Statute (`the optional clause'). That article provides that States may at any time declare they recognise as compulsory and without special agreement the jurisdiction of the ICJ. States can place conditions or exceptions on such a declaration. If the dispute in question is covered by the optional clause declarations of the countries involved, then the Court has jurisdiction to hear the dispute. (This is known as the `compulsory jurisdiction' of the Court). The Declaration that was lodged on 22 March relates to this third form of consent to the jurisdiction of the Court.

10. Australia is one of 61 countries out of the 189 members of the United Nations that has accepted the compulsory jurisdiction of the ICJ. Of those countries the majority have made reservations of various types to the jurisdiction of the ICJ.

11. Australia's acceptance of the compulsory jurisdiction of the ICJ under its previous 1975 declaration was very broad. It enabled countries to bring an action against Australia notwithstanding the fact that those countries may not have demonstrated a commitment to the process of compulsory jurisdiction of the ICJ. For example, they could lodge a declaration and then almost immediately commence an action against Australia.

12. The new declaration limits Australia's acceptance of the compulsory jurisdiction of the ICJ. This means that an action cannot be commenced against Australia in the following circumstances:

(a) where the parties have agreed to other peaceful means of dispute resolution;

(b) where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute; and

(c) where a country has accepted the compulsory jurisdiction of the court only for a particular purpose or has accepted the compulsory jurisdiction of the court for a period of less than one year.

13. The first listed exception, where parties have agreed to other peaceful means of dispute resolution, was included in Australia's previous declaration accepting compulsory jurisdiction of the ICJ lodged in 1975. The purpose of this exception is to ensure that where countries involved have chosen another means of dispute resolution in relation to a particular type of dispute that choice is respected and cannot be disregarded. More than half the States that have accepted ICJ jurisdiction have made this exception including the United Kingdom, Canada and Japan.

14. The exclusion of maritime boundary disputes from the declaration of acceptance of the compulsory jurisdiction of the ICJ is consistent with the Government's concurrent action of excluding sea boundary delimitation from the compulsory dispute mechanism procedure under the United Nations Convention on the Law of the Sea.

15. The exception concerning maritime boundary disputes is consistent with the Government view that such disputes are best resolved through negotiation rather than by a Court or Tribunal. Negotiation allows the parties to work together to reach an outcome that is acceptable to both sides. The Government is, and remains, committed to the peaceful settlement of disputes.

Australia, as an island continent, has some of the longest maritime boundaries in the world. It has maritime boundaries with many countries and the Government is concerned that every endeavour should be made to reach an agreed resolution of any maritime boundary disputes through peaceful negotiation.

16. The purpose of the third exception is to ensure that countries like Australia that have a broad and long term acceptance of the jurisdiction of the International Court of Justice are not exposed to the possibility of litigation by countries that only accept the compulsory jurisdiction of the Court for a short time and for a specific purpose.

Obligations

17. The declaration means that Australia accepts the jurisdiction of the ICJ over a dispute with another country that has also made a declaration accepting jurisdiction over that type of dispute. However as noted above, the Australian acceptance is subject to a number of exceptions:

(a) where the parties have agreed to other peaceful means of dispute resolution;

(b) where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute; and

(c) where a country has accepted the compulsory jurisdiction of the court only for a particular purpose or has accepted the compulsory jurisdiction of the court for a period of less than one year.

18. Australia's acceptance of the compulsory jurisdiction of the International Court of Justice in relation to other disputes remains unchanged.

Implementation

19. No new implementing legislation or amendment to legislation is required.

Costs

20. Australia will incur no additional costs through making this Declaration.

Consultation

21. There was no consultation outside Federal Government. The Declaration falls within the sensitive treaty action exception to the normal processes of tabling treaties prior to their entry into force. The action was not made public prior to it being taken to ensure the effectiveness of the declaration was maintained. Public knowledge of the proposed action could have led other countries to pre-empt the declaration by commencing an action against Australia in the International Court of Justice that could not be brought once the new declaration was made.

Regulation Impact Statement

22. No Regulation Impact Statement is required.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

23. It is open to Australia to modify its acceptance of the compulsory jurisdiction of the ICJ under article 36(2) by withdrawing and replacing its declaration at any time.

Withdrawal or denunciation

26. Australia can withdraw its declaration accepting the compulsory jurisdiction of the ICJ under article 36(2) at any time.

Contact details

Public International Law Branch

Office of International Law

Attorney-General's Department.

AUSTRALIAN DECLARATIONS UNDER ARTICLES 287(1) AND 298(1) OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, LODGED AT NEW YORK ON 22 MARCH 2002.

Documents tabled on 18 June 2002:

- National Interest Analysis

- Text of the proposed treaty action

Australian declarations under Articles 287(1) and 298(1)(a) of the United Nations Convention on the Law of the Sea 1982, lodged at New York on 22 March 2002.

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. Australia lodged a declaration under Article 287(1) of the United Nations Convention on the Law of the Sea (UNCLOS) choosing dispute settlement mechanisms concerning the interpretation and application of the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

2. By the same instrument, Australia also lodged a declaration under Article 298(1)(a) of UNCLOS that Australia does not accept any of the dispute settlement procedures provided for in Section 2 of Part XV with respect to disputes relating to sea boundary delimitations and historic bays or titles.

Date of proposed binding treaty action

3. The declarations were signed on 21 March 2002.

5. The declarations entered into force on 22 March 2002.

6. The Minister for Foreign Affairs wrote to the Chair of the Joint Standing Committee on Treaties on 25 March 2002, advising that the treaty action took place on 22 March 2002 with immediate effect. The reason for taking the treaty action prior to tabling and consideration by the Committee relates to its sensitivity. If it became known that the Government intended to take this action before the declaration under Article 298(1)(a) was lodged, then another country may have been able to pre-empt the Government's decision and commence proceedings against Australia prior to Australia's lodgement of the declaration.

Date of tabling of the proposed treaty action

7. 18 June 2002.

Summary of the purpose of the proposed treaty action and why it is in the national interest

8. The declaration under Article 287(1) means that Australia has selected its preferred means of dispute resolution under UNCLOS as the International Tribunal for the Law of the Sea and the International Court of Justice. The declaration under Article 298(1)(a) means that Australia does not accept the UNCLOS compulsory dispute resolution mechanisms in relation to disputes relating

to sea boundary delimitations and historic bays or titles. This is consistent with the Government's view that maritime boundary disputes are best resolved through negotiation and not litigation.

Reasons for Australia to take the proposed treaty action

9. UNCLOS provides for the compulsory settlement of disputes between Parties over the interpretation and application of the Convention. Article 287(1) of UNCLOS allows States to nominate their preferred dispute resolution mechanism from the following:

(a) the International Tribunal for the Law of the Sea (ITLOS) established in accordance with Annex VI of UNCLOS;

(b) the International Court of Justice (ICJ);

(c) an arbitral tribunal constituted in accordance with Annex VII of UNCLOS;

(d) a special arbitral tribunal constituted in accordance with Annex VIII of UNCLOS for specific categories of disputes.

10. Of the 138 parties to UNCLOS, 29 States have made declarations nominating their preferred dispute resolution mechanism.

11. The declaration made by Australia under Article 278(1) chose the following means for the settlement of disputes concerning the interpretation or application of UNCLOS, without specifying that one has precedence over the other:

(a) ITLOS; and

(b) the ICJ.

If another country involved in a dispute with Australia has not accepted either of these mechanisms, the default mechanism of an arbitration panel consisting of five members in accordance with Annex VII of the Convention would apply.

12. Australia chose the ICJ and ITLOS as its preferred means of dispute resolution because there are advantages in taking disputes to existing, internationally recognised forums. Arbitral tribunals are not pre-existing bodies and have to be constituted before dispute resolution can be commenced. This can be a time consuming and difficult process. Also, the parties to the dispute have to pay the full cost of both the tribunal and the arbitration. Australia already contributes to the cost of the ICJ and ITLOS and no additional costs are incurred by taking a dispute to the Court or the Tribunal.

13. UNCLOS (Article 298(1)) also allows States to exclude certain specified categories of disputes from compulsory dispute settlement. Australia has excluded one of those categories - disputes concerning sea boundary delimitation and historic bays or titles - from compulsory dispute settlement. As a result, any sea boundary disputes between Australia and another State cannot be subject to compulsory dispute settlement under UNCLOS. Of the 29 States that have nominated their preferred dispute resolution mechanism, 11 States have made an exception in relation to sea boundary disputes.

14. Notwithstanding that declaration, disputes concerning maritime boundaries could still be heard by a conciliation commission under UNCLOS. The results of conciliation are not binding.

15. The Government's view is that maritime boundary disputes are best resolved through negotiation, not litigation. Negotiations allow the parties to work together to reach an outcome

acceptable to both sides. The Government is, and remains, committed to the peaceful settlement of disputes. Compared to other countries, Australia, as an island continent, has some of the longest maritime boundaries in the world. It has maritime boundaries with many countries and the Government is concerned that every endeavour should be made to reach an agreed resolution of any maritime boundary disputes through peaceful negotiation.

Obligations

16. The declaration lodged by Australia under Article 287(1) means that Australia as a matter of international obligation has accepted the ICJ and ITLOS as forums for dispute settlement in relation to the interpretation or application of UNCLOS.

17. The declaration under Article 298(1)(a) means that Australia is not obliged to submit to compulsory dispute settlement under UNCLOS disputes relating to sea boundary delimitations or historic bays or titles.

Implementation

18. No new implementing legislation or amendment to legislation is required.

Costs

19. Australia will incur no additional costs through making this Declaration.

Consultation

20. There was no consultation outside Federal Government. The Declaration falls within the sensitive treaty action exception to the normal processes of tabling treaties prior to their entry into force. This action was not made public prior to it being taken to ensure the effectiveness of the declaration was maintained. Public knowledge of the proposed action could have led other countries to pre-empt the declaration by commencing an action against Australia in relation to sea boundary delimitation that could not be made once the declaration under article 298(1)(a) of UNCLOS was made.

Regulation Impact Statement

21. No Regulation Impact Statement is required.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

22. It is open to Australia under Article 287(1) of UNCLOS to alter its declaration choosing the means for the settlement of disputes concerning the interpretation or application of UNCLOS.

23. It is open to Australia under Article 298(1) of UNCLOS to alter its declaration that it does not accept any one or more procedures provided for in Part XV, Section 2 of UNCLOS in relation to the category of disputes in Article 298(1).

Withdrawal or denunciation

24. Australia can revoke its declaration under Article 287. However, under Article 287(6) the revocation does not take effect until three months after it has been deposited with the Secretary-General of the United Nations.

25. It is open to Australia to withdraw its declaration under Article 298(1)(a) at any time.

Contact details

Public International Law Branch

Office of International Law

Attorney-General's Department.

[11.28 a.m.]

CAMPBELL, Mr William McFadyen, First Assistant Secretary, Office of International Law, Attorney-General's Department

IRWIN, Ms Rebecca, Acting Senior Adviser, Office of International Law, Attorney-General's Department

FRENCH, Dr Gregory Alan, Director, Sea Law, Environmental Law and Antarctic Policy Section, Department of Foreign Affairs and Trade

RABY, Dr Geoffrey William, First Assistant Secretary, International Organisations and Legal Division, Department of Foreign Affairs and Trade

TRINDADE, Mr Dominic, Legal Adviser, Legal Branch, Department of Foreign Affairs and Trade

CHAIR—I welcome witnesses from the Attorney-General's Department and the Department of Foreign Affairs and Trade to give evidence in relation to the Australian declarations under articles 2871 and 2981 of the United Nations Convention on the Law of the Sea 1982 and the Australian declaration under paragraph 2 of article 36 of the Statute of the International Court of Justice 1945. As you were all witnesses in the last hearing I will not go over the warning about not giving false and misleading evidence. I am sure that you are all aware that these are regarded as proceedings of the parliament and should be treated accordingly. Would somebody like to make some opening remarks about this particular international instrument?

Mr Campbell—Before making some opening remarks, I note that the tabling of these treaties was anticipated in a letter sent to you on 24 March of this year, stating that the declarations had been lodged but that they would be tabled before the committee as soon as possible thereafter. They were lodged early, on the basis of the sensitive nature of the action, which is probably something that we will get into afterwards. Having stated that, we welcome the opportunity to explain to the committee these two instruments: the declarations relating to dispute settlement under the United Nations Convention on the Law of the Sea, which I will refer to as the Law of the Sea convention, or UNCLOS; and Australia's new declaration of acceptance of the jurisdiction of the International Court of Justice, which I will refer to as the ICJ.

Before moving on to the two declarations, I would like to make a preliminary point about international adjudication and arbitration in general, and that is that most if not all dispute settlement by international courts and tribunals is based upon the consent of the states appearing before them. That consent can be given in a variety of ways, as I will mention in relation to the ICJ. However, in the absence of its consent, a state cannot be taken before an international court or tribunal. In the absence of such consent by a state, no other state has the right to bring a dispute between the two of them before an international court or tribunal. The point I make is that consent is fundamental to international adjudication and arbitration.

CHAIR—So you cannot have a unilateral referral of a matter to the court?

Mr Campbell—That is exactly right. Moving on to the UNCLOS declaration, which was made on 22 March, Australia gave its consent to dispute settlement in relation to the interpretation and application of the Law of the Sea convention when it ratified that convention in 1994. Indeed Australia, together with New Zealand, utilised the dispute settlement proceedings under UNCLOS when both countries took Japan to an arbitration over southern bluefin tuna in 1999. While all parties to UNCLOS accept dispute settlement under the convention, the convention allows states parties certain choices, and those choices are both as to the means of dispute settlement and also as to the exclusion of certain forms of dispute from dispute settlement. The declaration made by Australia recently under the convention relates to those two choices.

The purpose of the first part of the declaration was to nominate the International Tribunal for the Law of the Sea and the ICJ as preferred means of dispute settlement under UNCLOS. The NIA sets out the other means that were the subject of that choice, and I will not go into them now. UNCLOS also enables countries to exclude specified forms of dispute from dispute settlement, and one of those express exclusions referred to in UNCLOS relates to the determination of maritime boundaries. Under its declaration, pursuant to that provision, Australia has excluded maritime boundary disputes from compulsory dispute settlement under the Law of the Sea convention. That action was taken in line with the government's view that maritime boundaries are best resolved through negotiation rather than by resort to an international court or tribunal. As a matter of statistics, of the 29 states parties to UNCLOS that have actually nominated preferred dispute resolution mechanisms, 11 have made similar exceptions in relation to maritime boundary disputes.

Moving on to the International Court of Justice, or ICJ, declaration, as is explained in the NIA, a state can accept the jurisdiction of the International Court of Justice in three ways. The first way a state can do this is by entering into an agreement with another country to refer a particular dispute to the International Court of Justice; that is referred to technically as a compromis.The second mechanism is that, in a treaty on a particular subject, a state might agree that the ICJ will have jurisdiction over disputes arising under that treaty—and the example I just gave of the declaration under the UN Convention on the Law of the Sea is an example of that. In other words, we have agreed under the UN Convention on the Law of the Sea that the ICJ can be used for the resolution of disputes under that treaty. The third form of consent is that under article 36.2 of the statute of the ICJ—commonly known as the optional clause—a state may lodge a declaration with the Secretary General of the United Nations, accepting the jurisdiction of the court in relation to any other country making a similar declaration: that is, there is an element of reciprocity. In making such a declaration, a state is entitled to place conditions or exceptions on its acceptance. If there is a dispute between two states, both of whom have lodged declarations under the optional clause that covered the dispute, then the ICJ has jurisdiction over it.

Australia's previous declaration in 1975 under the optional clause was an open declaration; it only included one qualification. The declaration made by Australia in March this year inserted a number of further qualifications. Those qualifications bring about a consistency with the declaration I just referred to under UNCLOS, which excluded maritime boundary disputes. They also bring about some commonality with qualifications that have been adopted by a number of other countries in relation to their ICJ declarations.

The four qualifications are set out in the NIA. In short, the first qualification is where we have agreed with another state to utilise another dispute resolution mechanism in relation to a particular dispute; in that case, that other means will be used and not the ICJ. That exception was contained in the previous declaration. The second qualification concerns maritime boundary disputes between Australia and another state, or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute. The effect of that exception, combined with the UNCLOS declaration, is to preclude compulsory dispute settlement of Australia's maritime boundaries.

I will give a bit of background about our boundaries. We have some of the largest maritime areas in the world, and we also have some of the longest maritime boundaries. It is the view of the government that the maritime boundaries, as I mentioned earlier, are best resolved by negotiation and not through resort to third party dispute settlement. All the current maritime boundaries that we have settled with other countries have been agreed by negotiation. Negotiation allows the parties to work together to reach outcomes acceptable to both sides for the long term.

The third qualification is where another state accepts the jurisdiction of the ICJ only for the purpose of a particular dispute. That reservation ensures that only countries that have the same broad acceptance of the jurisdiction of the ICJ can take Australia to the international court under the optional clause. The final qualification is in relation to cases where less than 12 months has elapsed since another state accepted the jurisdiction under the optional protocol. This is designed to protect Australia from litigation by countries that have accepted the jurisdiction of the ICJ for the sole purpose of bringing proceedings against Australia. Again, it relates to that issue of long-term acceptance of the jurisdiction.

Notwithstanding those qualifications, Australia still accepts the jurisdiction of the International Court of Justice in relation to most disputes. There has been quite a lot of reporting that Australia has withdrawn from the ICJ jurisdiction; that is simply not the case. Australia has put on some further qualifications, but it has not withdrawn from the jurisdiction. Indeed, as pointed out in the national interest analysis, Australia is in the minority of only one-third of United Nations members who accept ICJ jurisdiction under the optional clause. Of the 190-odd United Nations members, only 63 have made a declaration under the optional clause to accept the jurisdiction of the court. Of those 63 states, a majority—that is, 46—have placed some qualifications on their acceptance. If I could make a slight explanation, I think the NIA refers to 61 states as having accepted the jurisdiction of the ICJ.

CHAIR—Yes, it does.

Mr Campbell—It is very much a matter of reading some declarations and documentation. Some of those relate to declarations that were previously made in relation to the Permanent Court of International Justice prior to 1945. We have had a careful look at it and are fairly sure that the figure is 63. The other point I would make is that the web site containing those declarations is updated only every so often; it is not updated from day to day. We cannot be sure that the figure is exactly right at the moment, but it would be fairly accurate. I will conclude by saying that, consistent with its obligations under the UN charter, Australia is committed to the peaceful settlement of disputes. In this respect, the ICJ and the dispute resolution mechanisms under UNCLOS will continue to play an important role.

CHAIR—One of the exceptions applies where the parties agree to other peaceful means of dispute resolution. Take me through that scenario. What happens when Australia and another party agree to some other means of dispute resolution which does not resolve the dispute?

Mr Campbell—There would be no resort to the International Court of Justice in those circumstances.

CHAIR—There could not be, or there would not be?

Mr Campbell—There would have to be a separate agreement to take it to the International Court of Justice in those circumstances.

CHAIR—So Australia could go back on its exceptions at any time?

Mr Campbell—It is always open to Australia to agree with another country to take a particular dispute to the International Court of Justice. That was the first type of referral that I mentioned: under a so-called compromis, we reach a specific agreement to take a matter to the International Court of Justice.

CHAIR—In broad terms, we have accepted the jurisdiction of the ICJ since 1975?

Mr Campbell—We have accepted the jurisdiction of the ICJ virtually since its inception, which was around 1947. We accepted the jurisdiction of the Permanent Court before that.

CHAIR—So what was the point of the date of 1975?

Mr Campbell—That was the date our previous declaration was made, but before that there was another declaration in 1954. Prior to that, Australia made a declaration in relation to the Permanent Court in 1940.

CHAIR—But this is the first time we have made an exception or declaration with respect to maritime boundaries?

Mr Campbell—No. In fact, the 1954 declaration made reservations in relation to certain maritime matters.

CHAIR—What was the difference between that reservation and this current declaration?

Mr Campbell—The current declaration is certainly more comprehensive in its dealing with maritime boundaries, but bear in mind that the maritime boundaries in 1954 fundamentally related to the territorial sea only. The continental shelf was just developing at that stage; there was no concept of an exclusive economic zone. Of necessity, our current declaration is much broader.

Mr WILKIE—Have we ever been taken to court about boundaries?

Mr Campbell—Yes, we have.

Mr WILKIE—What was the outcome? Can you tell us about the case or cases?

Mr Campbell—The case in fact concerned the Timor Gap Zone of Cooperation that was agreed under the Timor Gap Treaty with Indonesia. Portugal took Australia to the International Court of Justice alleging, amongst other things, that the Timor Gap Treaty was illegal because the occupation of East Timor by Indonesia was illegal. However, Portugal could not take Indonesia to the court, because Indonesia had not accepted jurisdiction under the optional clause. The argument put by Australia in that case, relying upon some earlier authority called the Monetary Gold Case, was that Indonesia was what is known as 'an indispensable third party' to that action and the action could not sensibly be decided in the absence of Indonesia's presence before the court. Ultimately, that was the basis on which the court said it would not exercise jurisdiction over the matter, and that was where the matter was left.

Mr WILKIE—Is that the only case?

Mr Campbell—That is not the only case where Australia has been before the International Court of Justice.

Mr WILKIE—I mean over the maritime borders.

Mr Campbell—That is the only case that I can recall over maritime boundaries. There was another semi-maritime matter, and that was when Australia took France to the International Court of Justice in the mid-1970s over atmospheric nuclear testing in the Pacific, which had a maritime aspect to it.

Senator MARSHALL—You mentioned earlier that some other countries may be waiting for this process, to take us to court on some of the boundary issues. I thought you indicated that some other countries had ratified that agreement on the basis that they may be able to use that in some disputed boundary issues with us, unless I misunderstood.

Mr Campbell—I do not think I suggested that.

Senator MARSHALL—I am sorry. Do we have any unresolved boundary issues?

Mr Campbell—We have a number of unresolved boundaries—when I say 'unresolved', I mean boundaries yet to be agreed with other countries. As I think is set out in the NIA, we have maritime boundaries with seven countries. We have agreed our maritime boundaries with Indonesia, although the 1997 treaty, which is the final treaty we negotiated with Indonesia, is yet to enter into force. We have some unresolved continental shelf boundaries beyond 200 nautical miles with France that we are yet to resolve, both in relation to New Caledonia and its possession of Kerguelen, which is near Heard and McDonald Islands in the Southern Ocean. We also, of course, have an unresolved boundary with East Timor, but we have provisional arrangements in place. At the present time we are involved in maritime boundary negotiations with New Zealand, where we have maritime boundaries on four fronts, including between our Antarctic possessions. We also have unresolved boundaries with France and Norway in relation to where they abut the Australian Antarctic Territory. They are the unresolved ones.

CHAIR—This declaration was clearly pre-emptive, so who are we assuming is going to begin an action against Australia with regard to a sea boundary delimitation?

Mr Campbell—I cannot really get into the motives of why the declaration was made. There was no actual threat that I have seen in any newspapers, or things like that, about Australia being taken to court over its maritime boundaries. There were certainly a deal of writings and papers being given by academics saying that it was a possibility East Timor would take Australia to the court over its maritime boundaries.

CHAIR—We had not thought of a declaration prior to this? We had not thought it necessary to make this exception prior to 2002?

Mr Campbell—We have been considering for some time the question of the declarations under UNCLOS, which have really been outstanding since we became a party to it in 1994, both in relation to the forum for dispute settlement and in relation to the question of which exceptions under UNCLOS we would adopt. The government has now made that decision.

Mr MARTYN EVANS—In relation to the International Court of Justice, what is the status of the jurisdiction acceptance by countries like the United States and the major European Community powers? Have they more or less unreserved acceptance of the jurisdiction?

Mr Campbell—It might be useful if we provide to the committee the list of declarations made by the countries. We can do that very easily.

Mr MARTYN EVANS—Certainly the major ones would be helpful.

Mr Campbell—We will provide that list to you. The United States, France, China and the USSR do not accept the jurisdiction of the international court. France and the United States used to accept the jurisdiction under the optional clause. Most of the European countries, I think, have made a declaration under the optional clause. Not all of them, but many, have qualifications to it. For example, in our region New Zealand accepts the jurisdiction of the international court with qualifications, some of which relate to resources in its maritime zones. Indonesia does not accept the jurisdiction of the court under the optional clause although—as I mentioned earlier—it made a specific agreement with Malaysia to take a dispute over sovereignty of certain islands to the international court. That was heard by the court in June.

Mr MARTYN EVANS—That would be quite useful. Thank you.

Mr WILKIE—This is not a question; it is more a statement, but you may wish to comment on it. I would think you could understand that the international community might say to Australia, ‘You’ve had this in place since 1940. You’ve never had a judgment made against you and two months before East Timor—the only country likely to take action against you—you’ve suddenly decided to exclude this from the court’s jurisdiction.’ A cynic might say that it has been done to prevent East Timor taking us to court and, therefore, it is in Australia’s international interests.

Mr Campbell—There are a number of points I can make or repeat. Firstly, East Timor has said that it is keen on negotiation as a means of resolving these disputes. Secondly, this applies

to all our maritime boundaries; we are not just talking about our maritime boundaries with East Timor; we do have unresolved boundaries. Thirdly, it is the view of the government that maritime boundaries are best resolved by negotiation and not by resort to international arbitration or courts. To repeat another point: all our current boundaries with other countries have been negotiated.

Finally, the question of the acceptability of the boundary to both countries is very important, given that maritime boundaries remain in place for a very long period. You are much more likely to get acceptance of that boundary, and less tension over time, if it is done by agreement as opposed to an international court or tribunal. There have been cases—I can think of one instance—where countries have had a boundary resolved by arbitration and ended up with a very odd result which may not have been in the interest of either country. The case I am thinking of is a boundary that was set by arbitration between Canada and France in relation to some French possessions very close to the coastline of Canada. These islands ended up with an exclusive economic zone which was 200 nautical miles long and 10½ nautical miles wide. That made it very difficult in relation to regulated fisheries in the area. The fundamental point is that the government believes that maritime boundaries are best resolved by negotiation.

CHAIR—Do you know whether East Timor as a nation has accepted the jurisdiction of the International Court of Justice?

Mr Campbell—East Timor is not yet a member of the UN. Although it has applied for UN membership, it has to be approved in about September.

CHAIR—It has not entered into any international instruments of that nature because it is not yet a member of the UN.

Mr Campbell—It is not yet a member. If you are a member of the UN, it follows that you are also a party to the Statute of the International Court of Justice. Once East Timor became a party to the Statute of the International Court of Justice, if it wanted to, it could make a declaration under the optional clause of that statute.

CHAIR—Currently it has no status to refer a matter to the ICJ, anyway.

Mr Campbell—No, it does not. Let me put it this way: it is our view that they do not.

Mr WILKIE—But they may have in the future.

Dr Raby—The expectation is that they will join the UN in September.

CHAIR—Currently, as it stands today, they do not have standing to refer a matter to the ICJ?

Mr Campbell—No.

Senator KIRK—With respect to these maritime boundary disputes that we will now be negotiating directly with the other country, what will occur if agreement simply cannot be

reached? Is there an international arbitration process that we can agree to enter into if the ICJ is unavailable?

Mr Campbell—It is still the government's view that they are best resolved by negotiation, but it is always open to the two countries to agree specifically to refer a particular matter, including a maritime boundary delimitation, to either a special arbitral tribunal, like I mentioned in relation to the St Pierre and Miquelon matter, or they could agree to refer it to the International Court of Justice, if they wanted to. Also, there is still a measure under the United Nations Convention on the Law of the Sea, which I think is mentioned in the NIA, to the effect that if both countries are a party to the Law of the Sea Convention, either of those parties could refer the matter to a conciliation commission under the convention. That conciliation commission could look at it but the views or decisions of that conciliation commission would not be binding on either country.

CHAIR—Under the UNCLOS declaration, if Australia is involved in a dispute with a country that has not accepted either of our two preferred dispute resolution mechanisms, then there is this default mechanism of an arbitration panel?

Mr Campbell—That is right.

CHAIR—What are the advantages or disadvantages of a panel such as that?

Mr Campbell—I think they are referred to in part in the NIA. One of the reasons that Australia adopted the International Court of Justice and the International Tribunal for the Law of the Sea is that, firstly, Australia has knowledge of both of them, has been before them and has seen how they operate and, secondly, they are both standing tribunals and Australia has already contributed to their costs. If we take a matter or somebody else takes us to the ICJ or the International Tribunal for the Law of the Sea, we do not have to bear the costs of the tribunal and the judges. The other issue is that they are there, ready and available—

CHAIR—With established rules of procedure.

Mr Campbell—They can take matters quite quickly. That situation is as opposed to, for example, an annex 7 arbitration tribunal under the Law of the Sea Convention, of which we have had experience in the southern bluefin tuna case. It takes some time to establish the tribunal. There is quite a lengthy process of negotiation with the country with which you are in dispute over some other substantive issue as to who is going to be appointed to the tribunal and things like that. The other issue is that the countries involved in the dispute have to bear the costs of the running of that tribunal and the payment of the judges. They have to agree on how it is going to be organised.

CHAIR—It is very expensive.

Mr Campbell—There are substantial practical advantages in going to the ICJ and the International Tribunal for the Law of the Sea.

CHAIR—Why did we have to go to an arbitral tribunal under annex 7?

Mr Campbell—Because neither Japan, New Zealand nor Australia for that matter made a choice of tribunals under UNCLOS. We did have to go to the default mechanism, which was an annex 7 tribunal. Although we sought interim measures against Japan, the convention allows that those interim measures be heard by the International Tribunal for the Law of the Sea.

CHAIR—Is that in part why this declaration is being made?

Mr Campbell—In part, the declaration was held off because we wanted to see how the International Tribunal for the Law of the Sea operated, not just in relation to our own case but generally. It came into being only about two years after the convention entered into force. We just wanted to see how that operated before Australia decided whether or not to accept its jurisdiction. We did have experience before it. That is partly the basis on which the choice was made.

CHAIR—Thank you very much for your assistance this morning. It is very much appreciated.

Proceedings suspended from 12.02 p.m. to 1.04 p.m.